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No. 00-1937

In The

Supreme Court of the United States

JO ANNE B. BARNHART,
Commissioner of Social Security,

Petitioner,

v.

CLEVELAND B. WALTON,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

KATHRYN L. PRYOR
Counsel of Record
CENTRAL VIRGINIA LEGAL AID SOCIETY, INC.
P.O. Box 12206
Richmond, Virginia 23241
(804) 648-1012

JAMES W. SPEER
VIRGINIA POVERTY LAW CENTER
201 West Broad Street
Suite 302
Richmond, Virginia 23220
(804) 782-9430

MARCELLINUS L.M.B. SLAG
LEGAL AID JUSTICE CENTER
101 West Broad Street
Suite 111
Richmond, Virginia 23220
(804) 643-1086

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether a claimant is entitled to disability benefits if he has a severe physical or mental impairment which has lasted or is expected to last at least 12 months, but he engages in substantial gainful activity within 12 months of his onset date.

2. Whether a claimant under Title II is entitled to a trial work period if he has a severe impairment which has lasted or is expected to last more than 12 months, even though he returns to substantial gainful activity after the five-month waiting period but within 12 months of his onset date.

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STATEMENT OF THE CASE

Cleveland Walton, a college graduate and teacher, was denied disability benefits, despite his continuing psychiatric impairment, for the sole reason that he returned to work (as a grocery store clerk), despite his continuing impairment, within 12 months of his October 1994 onset date. Walton's return to work occurred after he applied for benefits and after the five-month waiting period, but before his disability was adjudicated and before 12 months had elapsed from the date he first became disabled.

Walton was hospitalized with major depression, recurrent with psychotic features, in October 1990 and again in May 1994. Petition Appendix ("App.") 55a. After losing his job as a teacher in October 1994, Walton attempted a series of jobs, but he was fired from each after a brief work period. The Administrative Law Judge ("ALJ") therefore deemed them to be unsuccessful work attempts. App. 53a. Walton was hospitalized a third time in March 1995 and was diagnosed as suffering with paranoid schizophrenia. App. 56a. At the time of both administrative hearings in July 1996 and June 1997, the ALJ concluded that Walton had a "listing-level" psychiatric impairment. App. 59a, 45a. However, because Walton had worked as a grocery store clerk, beginning with part-time work in May 1995, and because he earned more than the substantial gainful activity ("SGA") level of $500 in October 1995, the ALJ, after the second hearing, found that Walton had not been prevented from engaging in SGA for

a continuous period of at least 12 months. The ALJ concluded that Walton was not under a disability and consequently was not entitled to benefits or a trial work period. App. 44a, 45a.

The Appeals Council and the District Court upheld the ALJ's conclusions. App. 36a-38a; App. 15a-26a. On appeal, the Court of Appeals for the Fourth Circuit affirmed the district court's holding that Walton had returned to SGA in October 1995, but reversed the district court's holding that Walton was not under a disability when he engaged in SGA within 12 months of his onset date and before adjudication of his claim. The Fourth Circuit also reversed the lower court's holding that Walton was not entitled to a trial work period. *Walton v. Apfel*, 235 F.3d 184 (4th Cir. 2000) (Luttig, J.); App. 2a, 7a.

SUMMARY OF THE ARGUMENT

Cleveland Walton is entitled to disability benefits and a trial work period because he meets the statutory definition of disability and because, beginning in April 1995, he met all the criteria for entitlement to disability benefits. Because he was entitled to benefits as of April 1995, once the five-month waiting period from his October 1994 onset date had elapsed, his return to work beginning in late May 1995 and his return to substantial gainful activity in October 1995 should be covered by a trial work period.

A person is disabled if he has an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which

can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The express language of the statutory definition of disability shows that it is the *impairment*, not the inability to engage in substantial gainful activity, which must last 12 months. The language of the statute is clear and unambiguous and therefore the Commissioner's contrary interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984). The Fourth Circuit's interpretation of the disability definition not only is supported by the plain language of the statute, but is also consistent with the legislative history of the Social Security Act, the regulatory scheme of Social Security pertaining to disability, the rulings of other courts of appeals and district courts which have considered the question, and Congress' frequently stated goal of encouraging disabled persons to try to return to work as early as possible. From the inception of the disability program, Congress has demonstrated its intention to encourage disabled persons to try to work, despite continuing severe impairments. This intent is reflected in the trial work statute, which makes a trial work period available from the first month of entitlement to benefits, and in the Supplemental Security Income ("SSI") special benefits program, which allows reduced SSI benefits to be paid to persons who, despite continuing severe impairment, are engaged in SGA.

The Commissioner apparently concedes the point that the definition of disability requires that the *impairment*, not the inability to engage in substantial gainful activity, must last 12 months. (Pet. Brief 23, 30). "By its

terms, Section 423(d)(1)(A) requires that the *impairment* have lasted or be expected to last 12 months (or result in death)." (Pet. Brief 23.) The Commissioner contends, however, that the statute is silent, and therefore ambiguous, about "how severe the impairment must be during that 12-month period. In other words, it does not specifically address whether the impairment must persist with such severity as to preclude all substantial gainful activity during the qualifying period – much less foreclose the Commissioner from construing the Act to embody such a requirement." (Pet. Brief 30.) The Commissioner asks that this Court, instead of reading the statute as written, read into the statute language that is not there and find ambiguity in a definition which is explicit in its terms. Under basic rules of statutory construction and the *Chevron* line of cases, this Court is bound by the language of the statute where that language is clear and unambiguous and cannot give deference to an agency's interpretation that is contrary to the clearly expressed intention of Congress.

Under the statute, a person is entitled to disability benefits, beginning with the first month after a five-month waiting period, if he is insured, has not attained retirement age, has filed an application, and is under a disability. 42 U.S.C. § 423(a)(1). Cleveland Walton met all these criteria: he was under a disability because he had an impairment that was expected to last – and in fact *did* last – more than 12 months and his impairment was of such severity as to prevent SGA; he was also insured, was under retirement age, and had filed an application. He was therefore entitled to disability benefits for each month beginning in April 1995, when the five-month

waiting period expired. Moreover, because Congress made a trial work period available from the first month an individual is entitled to benefits, 42 U.S.C. § 422(c)(3), Walton was entitled to a trial work period to cover his attempt to work beginning in late May 1995 and his return to SGA beginning in October 1995.

Even if this Court were to conclude that the 12-month duration requirement applies to the inability to engage in SGA as well as the impairment, Walton would nonetheless be entitled to disability benefits and to a trial work period. The expectancy language of the disability definition ("can be expected to last") and the prospective standard required by the language of the entitlement statute ("for *each* month beginning with the *first* month") must be given their full effect. Consequently, if prior to his return to work in May 1995, he had a "disability" or an inability to engage in SGA (as well as an impairment) which was expected to last 12 months, then, at that time, he was disabled. Because he also met all the other requirements of entitlement, he was also entitled to disability benefits. If he was entitled to disability benefits, then he was also entitled to a trial work period to cover his return to work.

Because construction of the statutory language, the legislative history of the statute, the administrative regulations adopted pursuant to the statute, prior case law, and sound policy all favor Walton's position, the decision of the Fourth Circuit should be upheld.

ARGUMENT

I. The Fourth Circuit Properly Concluded that It Is the Impairment, Not the Inability to Engage in SGA, Which Must Last 12 Months.

A. The Plain Language of the Statute Defining Disability Dictates that It Is the Impairment Which Must Last 12 Months.

"Disability" is defined by the Social Security Act and regulations as:

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. § 423(d)(1)(A). As the Fourth Circuit concluded, it is evident from the plain language of the statute that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" refers to the impairment, not to the inability to engage in SGA. App. 8a. The Fourth Circuit concluded: "The statutory language is unambiguous, requires no agency interpretation, and leaves no doubt that neither a duration requirement for the inability to engage in substantial gainful activity nor a requirement that the benefits have been 'awarded' or adjudicated, exists." App. 7a.

In reaching this conclusion, the Fourth Circuit noted:

> In addition to the facial clarity of the language, the grammatical structure and logic of the statute further compel the conclusion that the clause, 'which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months,' refers to the impairment, not to the inability to engage in SGA; the clause manifestly does not modify 'substantial gainful activity'.

App. 7a-8a. As the court properly concluded, it would be completely illogical to conclude that the inability to engage in substantial gainful activity could result in death. Yet the Commissioner has offered precisely such a reading of the statute in its policy as initially set out in Social Security Ruling ("SSR") 82-52: "It is the inability to engage in SGA because of the impairment that must last the required 12-month period." SSR 82-52.[1] Such a construction of the language is absurd, as the Fourth Circuit properly, and logically, concluded.

The Commissioner now concedes that, in fact, the statutory 12-month duration requirement *does* apply to the impairment, not to the inability to engage in substantial gainful activity. (Pet. Brief 23, 30.) "By its terms, Section 423(d)(1)(A) requires that the *impairment* have lasted or be expected to last 12 months (or result in death)." (Pet. Brief 23.) The Commissioner contends, however, that the statute

> does not speak directly to whether the impairment must persist during those 12 months at

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[1] The Commissioner also relies heavily upon new final regulations found at 65 Fed. Reg. 42,772 (2000). These regulations became effective August 10, 2000 and are inapplicable to this case. Moreover, the final regulations make clear that they are merely a continuation of the frequently rejected policy originally proffered in SSR 82-52: "[T]he revisions we are making clarify, but do not change, our interpretation set forth in SSR 82-52." 65 Fed. Reg. 42,780 (2000).

> any particular level of severity – in particular, whether it must be sufficiently severe to prevent substantial gainful activity. Nor does it specify how long the *disability* – the inability to work "by reason of" the impairment – must last. On those issues, Section 423(d)(1)(A) is ambiguous.

Id.[2]

The Commissioner's argument apparently is that Congress did not mean what it said and that additional language should be read into the statute so that the statute can be read in accordance with the Commissioner's longstanding policy. The Commissioner's argument is contrary to the most basic rule of statutory construction. As this Court said in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted): "We have stated time and again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " "[W]hen "the statute's language is plain, 'the sole function of the courts' " – at least where the disposition required by the text is not absurd – 'is to enforce it according to its

[2] The Commissioner makes much of the "by reason of" language of the disability definition, suggesting that it demonstrates an "inextricable link" between the impairment and the resulting inability to work and that each must last 12 months. (Pet. Brief 16, 21, 23, 27, 30.) In fact, Social Security's own evaluation guide demonstrates that the "by reason of" linkage is intended to show that the inability to engage in SGA must result primarily from a medical impairment, not from economic conditions, hiring practices, etc. Disability Ins. State Manual § 314 (Sept. 9, 1965). The "by reason of" language implies nothing about duration.

terms.' " *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations omitted) (concluding that because the most natural reading of the bankruptcy statute extended recovery rights only to the trustee, petitioner's burden of persuading the court that the section should be read to extend rights to others was "exceptionally heavy"). "In analyzing a statute, we begin by examining the text, not by 'psychoanalyzing those who enacted it'." *Carter v. United States*, 530 U.S. 255, 271 (2000) (citations omitted). *Accord Duncan v. Walker*, 121 S.Ct. 2120, 2124 (2001) ("Our task is to construe what Congress has enacted."). In the case at bar, the literal reading of the statute produces a result that is not only not absurd, but is fully consistent with the intentions of the drafters. The petitioner has not and cannot meet her "exceptionally heavy" burden (*Hartford Underwriters*, 530 U.S. at 9) to persuade the court to construe the language to extend the 12-month requirement to the inability to engage in SGA.[3]

[3] The Commissioner attempts to couch this basic and indisputable rule of statutory construction into the guise of a maxim "expressio unius est exclusio alterius," which neither the Court of Appeals nor Walton ever asserted, and then to disparage that maxim as being inapplicable in the administrative law context. (Pet. Brief 36-37.) According to Black's Law Dictionary, "expressio unius est exclusio alterius" is a maxim of statutory interpretation "which means that the expression of one thing is the exclusion of another." This case is unlike those cases offered by the Commissioner to show the questionable reliability of the maxim. This is not a case where the recitation of certain prohibitions is said to imply that other activities must therefore be allowed, *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991), or where the delineation of two methods of rebuttal arguably excludes other

In drafting the definition of "disability," Congress was defining a core concept of the Social Security Act. It surely did not take lightly the responsibility to carefully define this key term. Congress could easily have drafted the definition to say what the Commissioner would like it to say, by simply stating that disability is:

> the inability to engage in any substantial gainful activity which has lasted or can be expected to last for a continuous period of not less than 12 months and which is caused by any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

That Congress easily could have drafted the disability definition in such a way but did not is *not* an indication that the statute is ambiguous, but rather is clear evidence that Congress meant what it says in the statute – that is, that the impairment must be severe and it must be expected to last 12 months or to result in death.

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unspecified rebuttal methods, *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703-4 (1991), or where the direction of something in one provision and its absence in another is used to imply the intent to negate it in the second context, as in *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 68 (D.C. Cir. 1990). To the extent the expressio unius maxim is relevant at all, its force should depend on the context and on whether, considering the structure of the statute and its legislative history, one can be confident that the draftsman in expressing one thing would likely have considered the alternatives which are arguably precluded. *Shook v. District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998).

The Commissioner suggests that the court of appeals' analysis ignores the text of 42 U.S.C. § 423(d)(2)(A), which requires that the impairment be of such severity as to render the person unable to perform any substantial gainful activity. (Pet. Brief 16, 24, 31.) Petitioner's argument is without merit. Walton has never denied the existence of a severity requirement, and there is no basis for any suggestion that he does not satisfy it. In fact, the regulation defining the "Listing of Impairments" explicitly states that the "Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing *any* gainful activity." 20 CFR § 404.1525(a) (emphasis added). By definition, a listing-level impairment, which Walton clearly has, meets the severity requirement set out in § 423(d)(2)(A). Moreover, because that section does not link the required severity to the 12-month duration requirement, the argumenf does nothing to advance the Commissioner's position.

The Commissioner argues that because the statute says nothing about the duration of an applicant's ability to engage in substantial gainful activity, the statute is ambiguous on that point, leaving a "gap" for the administering agency to fill. (Pet. Brief 23, 30). Although a statute's failure to address an issue may in some circumstances reflect an ambiguity or gap, that is not the case here. This statute states very clearly that disability means two things: an impairment satisfying the durational requirement, and a resulting inability to engage in substantial gainful activity. A person satisfying this definition, as well as the other statutory eligibility requirements, is entitled to benefits. A statute that says

that a person *is entitled* to something if he possesses specific defining characteristics is not "silent" about whether additional substantive requirements must be met; rather, it forecloses the possibility that such additional requirements may be imposed. As this Court has put it, "As a rule, 'a definition which declares what a term 'means' excludes any meaning that is not stated.' " *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979) (citation omitted); *see also Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of a term excludes unstated meanings of that term.").

The government's extrastatutory addition of a durational requirement for the inability to engage in SGA does not simply fill a hole in the statutory language; it directly contradicts the statute. The statute says that if a person satisfies criteria A and B, he or she is disabled. The government's "interpretation" says that such a person is not disabled unless he or she satisfies an additional criterion, C. The government would thus deny benefits to an applicant who met the statutory criteria that entitled him to receive them, contrary to the plain meaning of the statute.

The statute must be read as it is written, and the agency's attempt to read additional language into the statute is not entitled to deference. In *Chevron, U.S.A., Inc. v. Natural Resources Defense*, this Court clearly stated: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S.

837, 842-43 (1984). Only if "the statute is silent or ambiguous with respect to the specific issue" must the court look at whether the agency's answer is based upon a "permissible construction of the statute." *Id.* The Court of Appeals properly found that the agency interpretation of the Act was not appropriate in this case because the language of the statute "is clear and unambiguous. Moreover, even if interpretation were required, the Commissioner's interpretation – which assumes either a duration period or adjudication requirement and does violence to the grammatical structure of the statute – conflicts with the very statute it purports to elucidate. We are bound to reject such constructions." App. 6a-7a.

This Court has noted that "the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). This Court has also recognized that "[e]ven contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989). The Fourth Circuit properly concluded that the Commissioner's construction of the statute was inconsistent with the plain language of the statute. The Commissioner's interpretation, therefore, is entitled to no deference.

Other courts, construing the statutory language at issue, also have determined that the statutory language is so clear that the agency's interpretation is not entitled to

deference. *See*, e.g., *Salamalekis v. Comm'r of Soc. Security*, 221 F.3d 828 (6th Cir. 2000); *Hunter v. Department of Health & Human Services*, 851 F.Supp. 75, 77 (E.D.N.Y. 1994) ("On its face, S.S.R. 82-52 contradicts the plain language of the Social Security Act's definition of 'disability.' "); *Fabel v. Shalala*, 891 F.Supp. 202, 206 (D.N.J. 1995) ("Despite this level of deference, the Court finds the SSR 82-52 is plainly erroneous and inconsistent with the Act."); *Walker v. Sec'y of Health & Human Services*, 943 F.2d 1257, 1260 (10th Cir. 1991) (rejected agency's policy as "inconsistent with the language of the Act and, therefore . . . entitled to no deference.").

Congress has explicitly defined disability in such a way that the 12 month duration requirement applies only to the impairment. It is "beyond the permissible limits of administrative interpretation," *Social Security Board v. Nierotko*, 327 U.S. 358, 369-70 (1946), for the Commissioner to construe the Act to *add* a requirement that the inability to perform SGA also last 12 months. (Pet. Brief 30.) Congress cannot be said to have so inartfully drafted its one-sentence definition of disability. Instead, this Court must give effect to the statute *as written*, and, as written, the 12 month duration requirement applies to the impairment, not to the inability to engage in SGA.

B. This Interpretation of the Statute Is Consistent With the Legislative History of the Act.

Because the statute's language is clear and plainly forecloses the government's position, there is no need to resort to legislative history in this case. As this Court has repeatedly emphasized, while "[l]egislative history can

be a legitimate guide to a statutory purpose obscured by ambiguity," statutory language "must ordinarily be regarded as conclusive." *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (citations and internal quotations omitted). Thus, "there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' " *Ex parte Collett*, 337 U.S. 55, 61 (1949) (citation omitted). Here, where the statutory language is precise and unambiguous, and the legislative history relied on by the government consists primarily of what appear to be imprecise descriptions of the effect of the statute in committee reports (many of which postdate enactment of the relevant language), the Court should not be deflected from enforcing the statute as enacted.

In any event, the plain language of the statutory definition of disability is consistent with the legislative history surrounding the extension of Social Security to cover disabled workers in 1956. As the Commissioner's brief points out, the Social Security Act did not initially cover disabled workers but was amended in 1956 to add a system of disability benefits. Initially, disability was defined as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." 42 U.S.C. § 423(c)(2) (1958). Congress added disability benefits and included a "disability freeze" to

exclude periods of disability for purposes of determining insured status and calculating retirement benefits.

Congress' intent as it defined disability for the first time is instructive:

> There are two aspects of disability evaluation: (1) There must be a medically determinable impairment of serious proportions which is expected to be of long-continued and indefinite duration or to result in death, *and* (2) there must be a *present* inability to engage in substantial gainful work by reason of such impairment. . . . Disability must have lasted for 6 months before it may be considered. This provision is intended to exclude from consideration temporary *conditions* which *terminate* within 6 months.

S.Rep. No. 83-1987 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3710, 3730 (emphases added). It is clear from this statement that Congress did not intend to cover temporary impairments which might medically improve. The Senate Report went on to make even more explicit that it was the duration of the impairment, not the duration of the inability to engage in SGA, that concerned Congress:

> In prescribing that the freeze apply only in the case of impairments "which can be expected to be of long-continued and indefinite duration" your committee seeks to assure that only long-lasting *impairments* are covered. This provision is not inconsistent with efforts toward rehabilitation since *it refers only to the duration of the impairment and does not require a prediction of continued inability to work.*

Id. at 3730 (emphases added). This statement reflects Congress' concern from the very beginning of the disability

program that disabled persons be encouraged to return to work as early as possible. It is also evident that the definition of disability was intended to rule out short-term *impairments* whose symptoms might improve within a short period of time, not to rule out the truly disabled who, by true grit, attempt to work despite continuing severe impairment.

Significantly, when the disability definition was revised in 1965 to replace the "long-continued and indefinite duration" requirement with the current language requiring that the impairment "can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months," this change was considered to be a liberalization of the disability definition which would add approximately 60,000 persons to the disability rolls. S.Rep. No. 89-404, *reprinted in* 1965 U.S.C.C.A.N. 1943, 1945. Once again, it was clear that Congress was concerned about excluding short-term *impairments*: "The effect of the provision the committee is recommending is to provide disability benefits for a totally disabled worker even though his *condition* may be expected to improve after a year." *Id.* at 2039. The Conference Report No. 89-682 makes this explicit: "Under Senate amendment No. 312, the *impairment* must be one which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.* at 2249 (emphasis added).[4]

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[4] Petitioner contends that Congress should be deemed to have ratified the Commissioner's policy by amending the Act over the years without changing the Commissioner's

It is clear from the Congressional reports when the disability program was first implemented and when the

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construction. (Pet. Brief 33, 36, 38.) The Commissioner cites *Lorillard v. Pons*, 434 U.S. 575 (1978), in support of its position. However, *Lorillard* and subsequent cases of this Court, noted that Congress is presumed to be aware not only of the administrative interpretation of the statute but also the *judicial* interpretation of the statute ("we cannot assume . . . that Congress was unaware that courts had uniformly afforded jury trials under the FLSA." *Id.* at 585.) Similarly, this Court in *Bragdon v. Abbott* was persuaded by the uniformity of the administrative *and judicial precedent* which had consistently interpreted the statutory provision at issue in that case. 524 U.S. 624, 645 (1998). *See also, Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Williams v. Taylor*, 529 U.S. 420 (2000). The Commissioner's policy, in contrast, has been sharply at odds with judicial interpretations of the statutory provisions. Consequently, any failure to change the statute could just as easily demonstrate Congress' decision to ratify the *courts'* interpretation of the existing statutory language. Moreover, this Court has, on many occasions, expressed its skepticism regarding supposed congressional acquiescence to the agency's position. "Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care . . . Because 'subsequent history is less illuminating than the contemporaneous evidence,' respondents face a difficult task in overcoming the plain text and import of" the statute. *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001) (citation omitted). "Absent . . . overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.* at 170, n.5. *See also Alexander v. Sandoval*, 121 S.Ct. 1511, 1523 (2001) (congressional acquiescence "as a general matter . . . deserves little weight in the interpretive process." (citation omitted)). The Commissioner has fallen far short of establishing overwhelming evidence of Congressional acquiescence in this case.

definition of disability was amended in 1965 that Congress' concern has always been that persons with truly short-term impairments, from which they may quickly recover, not be covered by the Act, but that persons with long-term serious impairments should be covered and should be encouraged to return to work as soon as possible. The Commissioner suggests that the Court of Appeals offered "no plausible reason why Congress would have insisted that the underlying impairment last for 12 months but not the claimant's inability to work 'by reason of' that impairment." (Pet. Brief 29.)[5] To the contrary, that reason was explicitly stated by Congress when the disability program was first initiated. Congress did not want to cover persons with impairments from which they would quickly recover, but Congress did want to encourage disabled persons to try to return to work as early as possible. Congress accommodated these competing concerns – to restrict coverage and to encourage the disabled to try to work – by requiring that the *impairment* be expected to last at least 12 months, but *not* requiring that the inability to engage in SGA last 12 months.

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[5] The Commissioner would also have Walton identify a specific provision in the Act that expressly states that there is no duration requirement for the inability to engage in SGA or a provision which states that the impairment need not persist at a disabling level of severity for the 12 month period. *Id.* at 29. Such a directive is absurd because it essentially asks Walton to prove the negative. Congress cannot be expected to draft legislation to explicitly state what it did *not* intend. The language of the statute expresses what Congress *did* intend and that language must be accorded full meaning.

Congress' judgment is expressed unambiguously in the statutory language and in the legislative history, and must not be disturbed by this Court simply because the Commissioner's policy is at variance with Congressional purpose.

C. The Separation of the Duration Requirement (Applicable Only to the Impairment) and the Severity Requirement Is Consistent with Social Security's Own Regulatory Scheme.

Other Social Security regulations that further define the disability statute confirm that it is the impairment, not the inability to engage in SGA, which must last 12 months.

> Unless your *impairment* is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. *We call this the duration requirement.*

20 CFR § 404.1509; 20 CFR § 416.909 (emphases added). This is quite explicit language, clearly linking the 12-month requirement to the impairment, not to the inability to engage in SGA.

Moreover, the regulation describing the purpose of the Listing of Impairments expressly distinguishes between the severity of an impairment and its duration:

> The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must

> show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

20 CFR § 404.1525(a). The distinction between the severity and duration requirements is also reflected in 20 CFR § 404.1520(a), regarding the evaluation of disability in general, which states:

> Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled.

The only regulations that attempt to show that the inability to engage in SGA must be expected to last 12 months are the new 2000 regulations, based upon SSR 82-52 and a 1995 Notice of Proposed Rulemaking, 60 Fed. Reg. 12,166 (1995), which did not go into effect until August 2000 (while this and other litigation was pending). 65 Fed. Reg. 42,772 (2000). The new regulations are contrary to the express language of the statute, contradict various pre-existing and co-existing regulations, and therefore are entitled to no deference.

D. Most Courts Which Have Interpreted the Language of the Statute Have Concluded that the 12-Month Duration Requirement Applies to the Impairment, Not the Inability to Perform SGA.

Most of the courts which have interpreted the language of the disability definition have agreed with the Fourth Circuit's conclusion that the 12-month duration requirement applies to the impairment, not the inability to perform SGA. The Massachusetts District Court in *White v. Finch* carefully construed the language of the

disability statute (noting the grammatical structure and the common sense logical interpretation of the language), the legislative history, the administrative regulations, prior case law, and sound policy considerations (including encouraging work) to conclude that the impairment, not the inability to work, must last 12 months. 311 F.Supp. 307 (D.Mass. 1970).

The Fifth Circuit ruled on the issue in *Singletary v. Bowen*, holding that the Commissioner's position

> evidences a misunderstanding of the duration requirement. It confuses the duration requirement, which applies only to the impairment, with the severity requirement, which determines whether the impairment prevents the claimant from working . . . The statute quite clearly requires that it is the impairment only which must last for a continuous period . . . The statute . . . does not require that a claimant be unable to engage in work during the entire 12 month period.

798 F.2d 818, 821 (5th Cir. 1986). The Seventh Circuit also rejected the government's view:

> When an individual has been disabled for five consecutive months and suffers from an impairment which can be expected to last for a continuous period of twelve months, that person is entitled to disability benefits . . . The Act attempts to strike a balance between paying benefits to people who are disabled and encouraging them to return to work as soon as physically possible.

McDonald v. Bowen, 818 F.2d 559, 563-64 (7th Cir. 1986).

Likewise, the Sixth Circuit in *Salamalekis*, 221 F.3d at 833, rejected SSR 82-52 as inconsistent with the plain language of the Act.

> Salamalekis had not recovered completely from his impairment when he returned to work [within 12 months of onset] . . . As the agency itself found, Salamalekis's impairment was expected to last for 12 months as of March 2. This finding is not invalidated by Salamalekis's effort to return to work.

See also Jenkins v. Heckler, 783 F.Supp. 998, 1001 (D.S.C. 1992) ("the Secretary's premise that the plaintiff must be unable to work for twelve continuous months in order to be adjudicated 'disabled' is erroneous."); *Hassan v. Apfel*, 2000 U.S. Dist. LEXIS 16953 (S.D.N.Y. 2000) (holding that the ALJ erroneously found that claimant was not disabled because she had returned to work within 12 months of onset).

Significantly, the Commissioner has been able to muster only four cases that she says support her position. (Pet. Brief at 28.) Of these, surprisingly, one is *McDonald v. Bowen*, which clearly holds that a claimant is entitled to disability benefits and to a trial work period despite her return to work within 12 months of the onset of her impairment. 818 F.2d at 564. Moreover, *Estep v. Richardson*, is inapposite, because it only concluded that the claimant's *impairment* had not lasted 12 months. 459 F.2d 1015 (4th Cir. 1972). *Estep* is not a case, such as Walton's, where a person returned to work within 12 months of onset despite a continuing severe impairment. In sharp contrast to the *Estep* facts, it is undisputed that Walton's impairment continued at listing-level severity at the time

of his second hearing in June 1997, nearly three years after onset.

The Commissioner's two remaining cases, *Alexander v. Richardson*, 451 F.2d 1185 (10th Cir. 1971), *cert. denied* 407 U.S. 911 (1972), and *Titus v. Sullivan*, 4 F.3d 590 (8th Cir. 1993), are unpersuasive. In determining that inability to engage in SGA and the impairment must both last 12 months, these courts blurred the distinction between the duration requirement and the severity requirement that is set out in the statutory language, the legislative history, and the regulations. The *Alexander* court reasoned that the "[i]nability to engage in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time." 451 F.2d at 1186. While the statute does require that the severity requirement (inability to engage in SGA) and the duration requirement exist at the same time, it does not require that they coexist for 12 months. In addition, the facts of *Alexander* and *Titus* suggest that no consideration was given to the availability of a trial work period, or to the expectancy language (*see infra* pp. 29-30) and the need to consider the entitlement criteria prospectively from the point of application and to award benefits – and a trial work period – from the first month all eligibility criteria are met (*see infra* pp. 31-33).

In addition, *Alexander* and *Titus* have been effectively, though not explicitly, overruled. The Tenth Circuit in *Walker v. Sec'y of Health & Human Services*, 943 F.2d 1257 (10th Cir. 1991), and the Eighth Circuit in *Newton v. Chater*, 92 F.3d 688 (8th Cir. 1996), construed the statutory language to provide that benefits *are* payable and a trial work period *is* available if an impairment was expected

to last at least 12 months, even if the return to work occurred within 12 months of onset. "[A] fair reading of the Act indicates that an individual who suffers from an impairment that has lasted, or is expected to last, twelve months is entitled to disability insurance benefits, as well as a trial work period, after waiting five months." *Walker*, 943 F.2d at 1260; *accord*, *Newton*, 92 F.3d at 694 ("[U]nder the statute, a claimant need not have had a disability for twelve consecutive months before he may test his ability to work."). Admittedly, in *Walker* and *Newton*, the claimants' return to work actually occurred more than 12 months after onset. Nonetheless, the *Walker* and *Newton* courts' construction of the statutory language accords with the rulings of three other courts of appeals and many district courts in finding that benefits are payable and a trial work period is available despite a claimant's return to work within 12 months of onset. *See infra* pp. 37-40.

E. Policy Considerations Weigh in Favor of Walton's Position that the 12-Month Duration Requirement Applies to the Impairment, Not to the Inability to Perform Substantial Gainful Activity.

Walton's position that the 12-month duration requirement applies to the impairment, not the inability to engage in SGA, properly accommodates the competing policies of excluding those who are not truly disabled and encouraging those who are disabled to attempt to work. The Commissioner's suggestion notwithstanding, Pet. Brief 17, Walton's position is fully consistent with Congress' deliberate decision not to provide benefits in

cases of short-term, temporary disability. The dual requirements that the impairment be expected to last 12 months and that it be of such severity as to preclude SGA, in combination, eliminate short-term, transient disabilities from coverage. Some impairments, although of long-term duration -- e.g., controlled hypertension – are never so severe as to prevent SGA and therefore do not meet the severity requirement, while other impairments, although of substantial severity at the outset, would never be expected to last 12 months and consequently do not meet the duration requirement. In either instance, the applicant would be denied disability benefits. In sharp contrast, Walton's listing-level schizophrenia is an impairment which satisfies both criteria: by definition, it is of such severity as to prevent SGA, and it is of documented long-term duration.

Encouraging disabled claimants, like Cleveland Walton, to try to work, despite continuing severe impairment, not only is good public policy, but also implements the explicit language of the statute and clearly stated Congressional goals.

II. A Claimant is Entitled to Disability Benefits and to a Trial Work Period If He Meets All Other Requirements of Entitlement and the Five-Month Waiting Period Has Elapsed, Even Though He Returns to Substantial Gainful Activity Within 12 Months of Onset.

A. According to the Plain Language of the Statute and Supporting Regulations, an Individual Is Entitled to Benefits and a Trial Work Period If He Returns to SGA Within 12 Months of Onset.

A trial work period "is a period during which you may test your ability to work and still be considered

disabled." 20 CFR § 404.1592(a); 42 U.S.C. § 422(c)(2). "A period of trial work for any individual *shall begin with the month in which he becomes entitled* to disability insurance benefits[.]" 42 U.S.C. § 422(c)(3) (emphasis added); 20 CFR § 404.1592(e).

The requirements for entitlement to disability benefits are set out in 42 U.S.C. § 423(a)(1) ("the entitlement statute"):

> Every individual who –
>
> (A) is insured for disability insurance benefits . . . ,
>
> (B) has not attained retirement age . . . ,
>
> (C) has filed an application for disability insurance benefits, and
>
> (D) is under a disability (as defined in subsection (d) of this section),
>
> shall be entitled to a disability insurance benefit (i) *for each month beginning with the first month after his waiting period* (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits[.]

42 U.S.C. § 423(a)(1) (emphasis added); *see also*, 20 CFR § 404.315(a); 20 CFR § 404.320(b).

The statute and the regulations[6] make clear that a claimant is "entitled" to disability benefits beginning

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[6] The new regulations which the Commissioner presents in support of her position were not effective until August 2000. Moreover, they conflict with the express language of the statute and with other pre-existing regulations and are therefore not entitled to deference.

with "the *first* month covered by your application in which you meet all the other requirements for entitlement." 20 CFR § 404.316(a) (emphasis added); 20 CFR § 404.321(a).

There is no requirement that a claimant wait 12 months before becoming "entitled" to benefits. "Congress could have easily required, as does S.S.R. 82-52, a waiting period of a year before awarding any benefits. But it is evident from an analysis of the statute that, as a matter of policy, it chose not to do so." *Hunter*, 851 F.Supp. at 77.

Based upon the plain language of the statute and regulations, Walton was "entitled" to disability benefits, and consequently to a trial work period, beginning in April 1995, before he began his attempt to work at Food Lion, because at that time he met all the requirements for entitlement status: he was insured; he had not reached retirement age; he had applied; and he had been disabled for five consecutive months. He had a disability as defined by 42 U.S.C. § 423(d)(1)(A) because he had a severe mental impairment which was expected to last for a continuous period of at least 12 months.[7] Because Walton met all the criteria in April 1995, he was "entitled" to disability benefits beginning that month; and therefore, according to the plain language of the statute and supportive regulations, he was also entitled, at that time, to a trial work period.

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[7] A medical expert concluded prior to Walton's first hearing that Walton's impairment had lasted or could be expected to last at least 12 months. Dist. Ct. Record 261.

The Commissioner effectively concedes that if the duration requirement does not apply to the inability to engage in SGA, the Fourth Circuit's ruling on the trial work period must be sustained as well, since the principal basis for the government's attack on the trial work period ruling is its argument that the Fourth Circuit's construction of the duration requirement was erroneous. (Pet. Brief 43.) But even if the government were correct on the duration issue, the availability of a trial work period under the facts of this case is *not* dependent upon a finding that the 12-month duration requirement applies only to the impairment. Rather, the expectancy language of the disability definition and the prospective perspective required by the entitlement statute, in combination, assure that a trial work period *is* available in this case even if the 12-month duration requirement is found to apply to the inability to engage in SGA.

The expectancy language of the disability definition must be given full effect. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Market Co. v. Hoffman*, 101 U.S. 112, 115-6 (1879). To ignore the "can be expected to last" language leads to a result that is both contrary to the language of the statute and regulations, and patently unfair and arbitrary on its face. The Commissioner notes that the Agency could decide a claim within 12 months of onset and apply the "can be expected to last" language to approve benefits. (Pet. Brief 48-49.) The Commissioner apparently concedes that benefits paid based upon an expectancy could not be recouped even if the person returned to work

within 12 months of onset. Indeed, the Commissioner must concede this point, for to do otherwise would effectively eliminate the "can be expected to last" provision from the statute and replace the five-month waiting period with a 12-month waiting period, contradicting the explicit statutory language and the expressed intention of Congress.[8]

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[8] The Commissioner's concession that benefits paid based upon an expectancy cannot be recouped even if the person returns to SGA within 12 months of onset is consistent with case law. The Sixth Circuit considered this problem in *Sierakowski v. Weinberger*, 504 F.2d 831 (6th Cir. 1974), where a claimant, who had been approved for disability benefits based upon the expectation that his impairment would last more than 12 months, returned to work within 12 months of his onset date. The Appeals Council concluded that he was never entitled to benefits because he had returned to work within 12 months of onset. The Sixth Circuit, however, held that Sierakowski's return to work did not oblige him to repay the benefits he had received. "The result reached by the Secretary and by the District Court is to read into the statute a provision for the conditional payment of benefits, repayable where the expected duration does not develop . . . We find nothing in the statutory language to support such a view, and much in the legislative history to refute it. The statute plainly says that it permits benefits where the inability "can be expected to last for a continuous period of not less than twelve months." We conclude that by the use of the cited language the Congress established a prospective standard whereas the Secretary urges one governed by hindsight. . . . We recognize that the construction urged by the Secretary results perhaps in more certainty and is thus easier of application, but this does not, in our view, justify a departure from Congressional intent. Furthermore, that construction tends to penalize good faith and diligence. It takes little imagination to conclude that a claimant less motivated than plaintiff here would be sorely tempted to sit out the full twelve months if he knew that the law imposed such a forfeiture for an earlier return

The language of the entitlement statute requires that a *prospective* perspective be used from the date of application to assess whether all five prerequisites are met. The statute dictates this result by stating that benefits must be payable from the *first* month that all requirements are met, including passage of the five-month waiting period.[9] The courts have also recognized this prospective standard. "Although the requirement of a twelve month continuous disability is 'forward-looking and is not to be nullified by hindsight,' it is evident that it is *forward-looking from the point an application is filed.*" *Nappa v. Sec'y of U.S. DHHS*, 731 F.Supp. 579, 585 (E.D.N.Y. 1990) (emphasis added). *See also Salamalekis*, 221 F.3d at 832; *Hassan v. Apfel*, 2000 U.S. Dist. LEXIS 16953 (S.D.N.Y. 2000); Acquiescence Ruling ("AR") 92-6(10), AR 98-1(8), AR 00-5(6) (to establish eligibility for Title II benefits and a trial work period, claimant must establish that "at the

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to gainful activity." *Id.* at 833-35. *See also Kendrick v. Califano*, 460 F.Supp. 561 (E.D. Va. 1978).

[9] Even Social Security's early guidelines recognized this prospective standard. Noting that the long-continued and indefinite requirement refers only to the expected duration of the impairment when viewed as of the application date, the agency stated that where the medical evidence initially submitted establishes a condition which precludes SGA and which is expected to be of long-continued and indefinite duration as of the application date, a report that the claimant later recovered or returned to work after the application "would not be deemed to relate back and reflect on the individual's condition on the application date." OASI Disability Ins. Letter No. 39 at 1, 4 (Pt. V of the Disability Ins. State Manual) (Jan. 22, 1957).

time he/she returned to work and thereafter, the impairment was still expected to last for at least 12 consecutive months from the date of onset").

When Walton filed his application, and when the five-month waiting period expired, he had an impairment – *and* an inability to engage in SGA – which was expected to last 12 months. Therefore, he was entitled to disability benefits and to a trial work period once his five-month waiting period expired. To consider the requirements in hindsight after the 12 months have passed is contrary to the statute because it fails to award benefits in the first month in which all the statutory requirements are satisfied and in each successive month thereafter. Moreover, it reads into the statute a 12-month waiting period, which Congress neither imposed nor intended.

Even though the Commissioner's policy apparently allows a claimant already approved for benefits to retain those benefits if he returns to work within 12 months of onset, the policy is nonetheless unfair and arbitrary with respect to those claimants, like Walton, whose disability is not finally adjudicated within 12 months of onset. They are treated differently for the sole reason that Social Security did not adjudicate their case in a timely manner. As the Fourth Circuit noted, neither § 423(a)(1) nor § 423(d) mentions adjudication as a prerequisite to disability or entitlement to disability benefits. App. 13a. Similarly, the Sixth Circuit in *Salamalekis* refused to make the award of benefits, a factor dependent upon agency conduct, an additional prerequisite to trial work eligibility, finding such a prerequisite to be contrary to Congress' unambiguous intent. 221 F.3d at 833-4. *See also*

Hunter, 851 F.Supp. at 77 ("The point at which the Secretary comes to acknowledge the existence of a disability is not and should not be a consequential factor in the calculus of entitlement, let alone a determinative one."). Contrary to the Commissioner's contention that such a result is a "necessary consequence" of allowing Social Security to decide claims without having to wait 12 months from onset, (Pet. Brief 49), proper application of the entitlement statute eliminates these unfair consequences by awarding benefits in the first and each successive month in which all criteria of entitlement are met, regardless of when the claim is finally adjudicated.

B. This Construction of the Statute and Regulations Is in Accordance with the Legislative History of Title II and Title XVI Work Incentives.

The legislative history of the disability provisions of the Social Security Act demonstrates that Congress has, from the very beginning, sought to encourage disabled claimants to return to work as early as possible. This goal is clearly reflected in the express language of the trial work period statute, which makes a trial work period available from the very first month of entitlement to disability benefits. From the first extension of the Social Security program to disabled workers in 1956, there were provisions for referral of handicapped persons to state vocational rehabilitation programs, "to the end that as many disabled individuals as possible may be restored to gainful work." S.Rep. No. 83-1987 (1954) *reprinted in* 1954 U.S.C.C.A.N. 3710 at 3712, 3786, 3729.

When the Social Security Act was amended in 1960, Congress broadened the trial work period to include those who rehabilitated themselves or who worked under rehabilitation plans other than the state rehabilitation agencies. "The committee believes that the broadening of the trial-work period will be an incentive to greater rehabilitation efforts." S.Rep. No. 86-1856 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3619, 3623. The amendments also provided for disability benefits to be paid, without a second waiting period, for those whose disability recurred relatively soon after termination of benefits. "This will encourage disabled persons to return to work even though there may be question as to whether their work attempts will be successful. Most disability insurance beneficiaries who return to work do so despite severe impairments," which make the loss of a job and the recurrent need for disability benefits more likely. *Id.* at 3624.

Even when it tightened up the disability standard in the 1967 amendments, Congress maintained the trial work provisions:

> Paragraph (4) of the new section 223(d) directs the Secretary by regulations to prescribe the criteria for determining when services or earnings demonstrating ability to engage in substantial gainful activity, and provides that an individual whose work or earnings meet these criteria will be found not to be disabled (*except in the case of work performed during a 'period of trial work'*).

S.Rep. No. 90-744 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 3103 (emphasis added).

Perhaps the most compelling indication of Congress' intent to encourage disabled beneficiaries to attempt to work and not to penalize them for those efforts is the Employment Opportunities for Disabled Americans Act which, in 1986, made permanent the special disability benefits under the Supplemental Security Income ("SSI") program and eliminated all time limits on SSI disability beneficiaries' entitlement to work while still receiving benefits. Significantly, the special cash benefits program makes reduced SSI benefits payable to persons who work at or above the SGA level despite continuing severe medical impairment. 42 U.S.C. § 1382h; 20 CFR § 416.262. The legislative history of this program reflects Congress' strong desire to encourage disabled persons to attempt to work without the disincentive of termination of benefits.

> While the Congress has found it necessary and important to limit eligibility under these programs to those who are so medically disabled that they cannot work, the Committee recognizes that some individuals determined to meet the Social Security Act definition of disability are nevertheless so motivated towards work and independence that they later manage to work in spite of their impairments.
>
> Such individuals present a difficult dilemma for public policy. Allowing them to continue receiving income maintenance benefits would seem to undermine the fundamental Congressional decision that eligibility be limited to those who cannot work. This policy could lead to a far broader program which would not only be much more costly but would also raise serious policy issues.

> On the other hand, terminating benefits in such circumstances can be a powerful disincentive to the work efforts which these severely disabled individuals are otherwise motivated to attempt . . .
>
> . . . The Committee recognizes that section 1619 . . . will create some anomalous situations. The Committee believes however that the acceptance of some anomalies is a reasonable price to pay for a program which, without an expansion of the basic SSI program, removes substantial disincentives to work attempts by the most highly motivated disability recipients.

S.Rep. No. 99-466 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6087, 6088-90.[10]

It is clear from the legislative history that Congress has already weighed the competing concerns of possible expansion of the disability rolls versus encouraging disabled persons to try to work without the disincentive of immediate termination from the disability program, and that Congress has weighed in on the side of work incentives for disabled persons. This predisposition is demonstrated both in the SSI special cash benefits provisions and in the trial work statute under Title II, which makes a

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[10] Significantly, the committee concluded that the "overall economic impact on consumers and businesses would be negligible." *Id.* at 6097. In fact, the Congressional Budget Office estimated that there would actually be cost *savings* to SSI, concluding that "an estimated 20 to 30 percent of 1619 participants would reduce their work activity in the absence of the 1619 protections. Section 1619 thus encourages some disabled participants to increase their earnings, which in turn reduced SSI." *Id.* at 6099.

trial work period available from the very first month a person becomes entitled to disability benefits.

C. This Construction of the Statute is Supported by the Rulings of Four Other Courts of Appeals and Numerous District Courts.

The Fourth Circuit's construction of the statute and regulations is in accordance with the rulings of four other Courts of Appeals and many district courts. These courts, consistent with the language of the statute and long-standing regulations, have focused on the five-month waiting period and held that, because the statute and regulations entitle an applicant to benefits from the *first* month all criteria are met, including passage of the waiting period, the trial work period, which by definition begins in the month when the applicant is first entitled to benefits, must begin at that same time.

The leading case of *McDonald v. Bowen* held that an "individual who suffers from an impairment that is expected to last at least twelve consecutive months is entitled to benefits (as well as to a trial work period) after completing the five-month waiting period" even though the claimant had returned to work before the hearing and before 12 months had elapsed from the date of onset. 818 F.2d 559, 564 (7th Cir. 1986).

Likewise, the Tenth Circuit in *Walker v. Sec'y of Health & Human Services* concluded that an individual who suffers with an impairment which has lasted, or is expected to last, 12 months is entitled to disability benefits and to a trial work period after waiting five months. 943 F.2d at

1260. Similarly, the Eighth Circuit in *Newton v. Chater* rejected the rationale of SSR 82-52 and held:

> According to the statute and regulations, though, a trial work period starts in the month that entitlement to disability benefits begins, which is the month following five consecutive months of being under a disability that has lasted or is expected to last a total of twelve continuous months . . . In other words, under the statute, a claimant need not have had a disability for twelve consecutive months before he may test his ability to work.

92 F.3d at 694.

Most recently, the Sixth Circuit in *Salamalekis v. Comm'r of Soc. Security* ruled that, pursuant to the plain language of the Act, the claimant, who had established all five prerequisites of entitlement, was entitled to disability benefits and to a trial work period despite his return to work within 12 months of his onset date. 221 F.3d at 832, 834. The Court explicitly rejected the Commissioner's position that Salamalekis' return to work within 12 months of onset precluded a finding of disability:

> This position ignores the complete definition of disability under the Act, which covers not only those impairments that actually last 12 months, but also those impairments expected to last 12 months. At the time Salamalekis returned to work on March 2, 1992, his impairment was ongoing and was expected to last for 12 months, and the SSA so found. A claimant who meets Congress's prospective standard for disability cannot be denied benefits based on hindsight.

Id.

District courts have repeatedly adopted the rationale of the *McDonald, Walker, Newton* and *Salamalekis* courts, and their construction of the statute and regulations. *See, e.g., Mulderig v. Sullivan*, 1993 U.S. Dist. LEXIS 908 (S.D.N.Y. 1993); *Fabel v. Shalala*, 891 F.Supp. 202 (D.N.J. 1995); *Hunter v. Dept. of Health & Human Services*, 851 F.Supp. 75 (E.D.N.Y. 1994); *Wilson v. Shalala*, 841 F.Supp. 1491 (E.D. Wash. 1994); *Tepfer v. Sec'y of Health & Human Services*, 712 F.Supp. 156 (W.D. Ark. 1989); *Goldstein v. Harris*, 517 F.Supp. 1314 (S.D.N.Y. 1981); *Darring v. Callahan*, 1997 U.S. Dist. LEXIS 15187 (S. Ala. 1997); *Deihl v. Sec'y of Health and Human Services*, 835 F.Supp. 1182 (C.D.Cal. 1993); *Jenkins v. Heckler*, 783 F.Supp. 998 (D.S.C. 1992); *Hassan v. Apfel*, 2000 U.S. Dist. LEXIS 16953 (S.D.N.Y. 2000).

In all of these cases except *Walker* and *Newton*, the claimant had returned to work prior to final adjudication of his claim and within 12 months of his onset date. Each court analyzed the statute and regulations to hold that a claimant is "entitled" to disability benefits – and therefore to a trial work period – in the first month in which he meets all the criteria, including passage of the five month waiting period, such that the return to work was protected by a trial work period. Likewise, in this case, if, as the medical record clearly establishes, Walton had a disabling impairment which was expected to last at least 12 months, then he was entitled to disability benefits beginning in April 1995, once his five-month waiting period had elapsed. Consequently, his return to SGA in October 1995 must be considered as part of a trial work period and Social Security may not deny benefits to Walton on

the basis that he had, by that work, demonstrated an ability to engage in SGA. *McDonald*, 818 F.2d at 565.

D. Sound Policy Concerns Undergird the Rulings of the Fourth Circuit and Other Courts.

The sound policy concerns which underlie the rulings of the Fourth Circuit and other courts echo concerns raised by Congress throughout the legislative history. Key among those concerns was a desire to encourage disabled persons to try to work, despite continuing severe impairment, without the disincentive of losing benefits because of that work. As the *Hunter* court noted:

> Although SSR 82-52 no doubt serves to weed out the temporarily disabled, it also excludes the truly disabled who, like Ms. Hunter, after waiting indefinitely, are trying their level best to be productive. The agency's present posture in SSR 82-52 undermines such a claimant's initiative instead of encouraging it, as it ought to. The policy rewards apathy, as claimants come to realize that it is prudent to stay in bed probably until the anniversary of their disability, but certainly no sooner than the date upon which the agency stamps its approval on the disability claim. Congress could not have intended this result – deterring claimants who wish to return to work from doing so, especially if they do not do so because of the agency's inefficiencies.

Hunter, 851 F.Supp. at 79.

Like the Fourth Circuit, other courts have highlighted the inequity of making entitlement to benefits and a trial work period contingent upon the timing of the

agency's determination. *See*, e.g., *Tepfer*, 712 F.Supp. at 159 (noting that Social Security's interpretation would result in unequal treatment of applicants depending on the efficiency and workload of the Social Security office in which they filed); *Deihl*, 835 F.Supp. at 1189 n.5. (recognizing that economic necessity often forces claimants to return to work despite continuing impairment, forcing them "to choose between staying home without funds, thus, staying safely within the Secretary's regulatory scheme, or going to work because of economic necessity but running afoul of the Secretary's regulations").

The statutory construction endorsed by the Fourth Circuit and numerous other courts ensures that claimants are not penalized because they are forced to apply in an inefficient or overloaded Social Security office, and it promotes Congress' legitimate and clearly expressed goal of encouraging disabled persons to try to work without the disincentive of a disallowance because of the work attempt.

Cleveland Walton has been penalized by Social Security for his persistent effort to work despite his schizophrenia, and has been forced to endure six years of litigation in an effort to receive disability benefits. There is no question but that benefits would have been paid years ago had Mr. Walton merely stayed home and not attempted to work. Social Security's policy violates the unambiguous language of the disability definition and of the entitlement and trial work period statutes, and contravenes clearly expressed Congressional goals. The Commissioner's unlawful policy should be rejected so

that others like Cleveland Walton are not penalized in the future for their courageous, good-faith efforts to work.

CONCLUSION

The judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

KATHRYN L. PRYOR
Counsel of Record
CENTRAL VIRGINIA LEGAL AID SOCIETY, INC.
P.O. Box 12206
Richmond, Virginia 23241
(804) 648-1012

JAMES W. SPEER
VIRGINIA POVERTY LAW CENTER
201 West Broad Street, Suite 302
Richmond, Virginia 23220
(804) 782-9430

MARCELLINUS L.M.B. SLAG
LEGAL AID JUSTICE CENTER
101 West Broad Street, Suite 111
Richmond, Virginia 23220
(804) 643-1086